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## KETCHUM V. BYRNE: THE HARD LESSONS OF DISCRIMINATORY REDISTRICTING IN CHICAGO

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Upon the completion of the 1980 census, politicians in Illinois were required to redraw various electoral boundaries in order to comport with the principles of one person, one vote. Whether it was congressional districts, state legislative districts, or Chicago city wards, the response was—to say the least—inadequate, racially discriminatory, and costly to the taxpayers of the State.

With regard to congressional districts, the Illinois legislature failed to enact any redistricting plan whatsoever. As a consequence, various petitions were filed with the federal court in Chicago asking the court to adopt a congressional redistricting plan for the State of Illinois. After extensive litigation involving allegations of racial and political discrimination, a special three-judge district court panel adopted the congressional map which was to govern elections in the State for a decade.<sup>1</sup>

The Illinois legislature also failed to adopt a legislative redistricting plan for the State Senate and General Assembly. As a consequence, pursuant to the Illinois Constitution, a special Legislative Redistricting Commission was created. The nine-member Commission, controlled by five members approved by the Democratic Party, ultimately adopted a plan which became the subject of bitter litigation brought by blacks, Hispanics and Republicans.<sup>2</sup> A special three-judge federal district court panel reviewed the Commission's plan and found that the Legislative Re-

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Mr. Colman, together with other attorneys from Jenner & Block, and State Senator Richard H. Newhouse, Jr., represented the *Ketchum* plaintiffs from the initiation of the lawsuit through its conclusion. They were joined by Robert T. Markowski and Julie Reynolds Shaw, of Jenner & Block, from the initiation of the suit through the proceedings in the United States Supreme Court; and by Mr. Brody from the proceedings in the Supreme Court through its conclusion. Mr. Colman also represented plaintiffs in the state legislative redistricting case. Mr. Brody was involved in the litigation contesting the results of the special elections ordered by *Ketchum v. Byrne*.

1. The history of the congressional redistricting is described in *In re Illinois Congressional Dists. Reapportionment Cases*, 704 F.2d 380, 381 (7th Cir. 1983).

2. *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982) (three-judge panel) [hereinafter *Rybicki I*].

districting Commission intentionally discriminated against blacks in the city of Chicago.<sup>3</sup> To our knowledge, this is the only court outside of the deep South to find intentional discrimination against blacks in a redistricting process.

The Chicago City Council fared no better. In the fall of 1981, the Council adopted a redistricting plan for the fifty wards within the city of Chicago. That plan blatantly discriminated against blacks and Hispanics in the city. The resulting litigation, *Ketchum v. Byrne*,<sup>4</sup> is the subject matter of this chronicle.

After four years of litigation in the district court, the Seventh Circuit, the Supreme Court, and back in the district court, the parties finally settled on a ward map that adequately reflected minority voting power. In the meantime, the city of Chicago suffered the consequences of the City Council's illegal actions. This article will explore the social and political impact of the illegal redistricting; the protracted litigation of *Ketchum v. Byrne*; and the legal analysis which the district court and the Seventh Circuit applied to the violation of the Voting Rights Act and the selection of an appropriate remedy for that violation.

## I. LESSONS OF *KETCHUM V. BYRNE*

The selection of the proper remedy in *Ketchum v. Byrne* for a violation of the Voting Rights Act was the important legal issue that divided the Seventh Circuit, was presented to the Supreme Court, and, on remand, concerned the district court. We discuss that issue in section III *infra*. Far more significant, however, is the social and political impact that the illegal redistricting and the resulting litigation had on the city of Chicago.

### A. *Effect on City Council Politics*

The case of *Ketchum v. Byrne* coincided with the tumultuous period in Chicago political history surrounding the election of Harold Washington, the first black mayor of the City of Chicago. When the suit was filed in 1982, Harold Washington was in Congress, having recently participated as a member of the Judiciary Committee in amending Section 2 of the Voting Rights Act. During the initial trial, Harold Washington testified as a witness for the plaintiffs, describing the discrimination experienced by black voters and candidates. In 1983, Harold Washington

3. *Id.* at 1108-12.

4. *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), *on remand*, 630 F. Supp. 551 (N.D. Ill. 1985).

became mayor in an election which also saw the fifty members of the City Council elected using the ward map implemented after the first trial of *Ketchum v. Byrne*. As the Seventh Circuit later held, that map under-represented the power of minorities in ward elections.

The disenfranchisement of minority voters produced a City Council in 1983 which divided sharply, primarily along racial lines, with the white aldermen holding a twenty-nine to twenty-one advantage. The division of the City Council, soon known as "Council Wars," helped earn Chicago its reputation as "Beirut on the lake." In many respects and for several years, city government stopped. Mayoral appointments were not acted upon, legislative action stalled, and the city failed to address many problems until they reached crisis proportions.

The paralyzing polarization of the City Council ended with the special elections ordered by the court in 1986 as a part of the remedy to the City Council's illegal 1981 redistricting. As a result of those elections, minority candidates representing communities excluded from the political process by the 1981 map joined the City Council, shifting the balance of power to the Mayor.<sup>5</sup>

Whether the consolidation of city power in Mayor Washington's hands was a good development may depend upon one's political views, and in Chicago there has been no shortage of opinion on the topic. Nonetheless, the dramatic shift in power which resulted from the special elections demonstrates the degree to which the City Council deprived minorities of their voting rights in 1981. For better or worse, and these authors believe better, the city would have been much different had minority residents been able to elect aldermanic candidates of their choice in 1983, rather than having to wait until 1986. The City Council's illegal conduct had more than simply an impact on voting rights—which, although fundamental, are intangible. In this case, the impact of discrimination is clear. The City Council, by violating the voting rights of the citizens it was sworn to serve, irreparably changed the face of city politics. It took four years of litigation and the intervention of the federal courts to correct the City Council's action and permit the City Council to be constituted in accord with the wishes of the people of the city.<sup>6</sup>

5. After the special elections, the City Council was evenly divided, permitting the Mayor to cast the deciding vote.

6. The special elections became the final contest in this saga, and, after an extended court battle, see *Torres v. Board of Election Comm'rs*, 142 Ill. App. 3d 955, 492 N.E.2d 539 (1986), and run-off elections, the duly elected representatives of the newly formed minority wards were in office.

### B. *Hispanic Political Development*

The case of *Ketchum v. Byrne* also coincided with a period of tremendous growth in Hispanic political power in Chicago. Miguel Santiago, the first Hispanic elected alderman in Chicago in recent history, was elected in 1983. He was elected from the 31st ward, which had been redrawn by the district court in 1982 as a part of its initial remedy. In 1986, as a result of court-ordered special elections held after the map was properly redrawn, three other Hispanic aldermen joined the City Council. In the mayoral election in the spring of 1987, and in the special City Council election of an Acting Mayor upon the untimely death of Mayor Washington in November 1987, Hispanic voters and politicians played a critical role.

The impact of *Ketchum v. Byrne* on Hispanic political development should not be overstated; Hispanic voting strength had been growing steadily in Chicago and the ultimate recognition of its critical role in a city divided on racial lines was inevitable. Nonetheless, the special elections ordered by the court in *Ketchum v. Byrne* contributed to the rapid political development of the Hispanic community. The remap and special elections assured Chicago's Hispanic community of the right to participate equally in the political process and contributed greatly to the present electoral and political strength of Chicago's Hispanics.

### C. *Cost*

Unfortunately, the vindication of voting rights in *Ketchum v. Byrne* came at great cost. The case took four years to resolve. In the interim, a significant portion of the city did not have an equal opportunity to participate in municipal elections.<sup>7</sup> Moreover, the city ultimately was forced to pay the legal fees of not only its attorneys—initially private attorneys and later assistant Corporation Counsels, who were distracted from their normal responsibilities—but also the attorneys for each of the three groups of plaintiffs. Not counting the time spent by city attorneys, the City of Chicago was forced to pay over \$2.3 million in attorneys' fees.<sup>8</sup> These fees were incurred solely as a result of the vote of the City Council to adopt the illegal ward map.

7. The case still lingers in the judicial system. Some seven years after its filing, the request of one group of plaintiffs' lawyers for a multiplier on their attorneys' fees still is pending.

8. See Stipulation for Entry of Judgment for Attorneys' Fees and Costs, *Ketchum v. City Council*, No. 82 C 4085 (N.D. Ill. filed May, 30, 1986); Motion to Strike Petition for Rehearing with Suggestion for Rehearing En Banc at 5, *Ketchum v. Byrne*, No.83-2044 (N.D. Ill. filed June 7, 1984); Stipulation for Entry of Judgment for Attorneys' Fees and Costs, *Ketchum v. Byrne*, No. 82 C 4085 (N.D. Ill. filed Oct. 17, 1986).

Whether their motive was to perpetuate their incumbencies or to discriminate, the result was the same: the City Council's illegal conduct cost millions of dollars and took years to remedy.<sup>9</sup> The heroes in this story are the aldermen who voted against the 1981 redistricting (many doing so precisely because of its effect on minority voting rights<sup>10</sup>) and the plaintiffs who stepped forward to challenge the unconstitutional deprivation of their voting rights.<sup>11</sup>

## II. *KETCHUM V. BYRNE*: THE LONG LITIGATION ROAD

### A. *The 1981 Redistricting*

Between 1970 and 1980, the city of Chicago underwent drastic population changes. Chicago's white population decreased while its black and Hispanic populations grew dramatically. In 1970, whites comprised 60.5% of the population, blacks 32.7%, and Hispanics 7.3%. By 1980, whites comprised 43.2% of the city's population, blacks 39.8%, and Hispanics 14%.<sup>12</sup> As a result of these dramatic population changes, when the results of the 1980 census were released, it was clear that the fifty aldermanic districts in the city of Chicago would have to be substantially redrawn. To comply with the constitutional and statutory commands of one person, one vote,<sup>13</sup> it was necessary to redraw ward lines to equalize ward population. The 1980 census showed that some wards exceeded the equalized ward population by over 17,000 residents, while other wards fell short of this population goal by 19,000 residents or more.<sup>14</sup>

To accomplish the redistricting required by Constitution and statute, the City Council had to address the dramatic residential segregation

9. Unfortunately, the result of *Ketchum v. Byrne* does little to prevent recurrences of this waste. The cost was borne by the City, not the aldermen who voted to discriminate and to perpetuate their incumbencies. Cases permit courts to assess legal fees of prevailing parties upon intervening parties, such as the 25 members of the City Council who supported this plan. See *Zipes v. Trans World Airlines, Inc.*, 846 F.2d 434 (7th Cir. 1988), cert. granted sub nom. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 835 (1989); *Charles v. Daley*, 846 F.2d 1057, 1062-77 (7th Cir. 1988). Perhaps this alternative should be given greater consideration.

10. The following aldermen voted against the 1981 redistricting ordinance in the final November 30, 1981 vote: Evans, Bloom, Bertrand, Streeter, Davis, Oberman, and Orr. Journal of Proceedings, Chicago City Council 8107 (Nov. 30, 1981). As the City Council was often quick to point out, many black aldermen voted for the illegal map. See *infra* note 30.

11. The plaintiffs and their counsel are identified *infra* notes 33-35.

12. See *Ketchum*, 740 F.2d at 1400.

13. See *Baker v. Carr*, 369 U.S. 186 (1962); Voting Rights Act, 42 U.S.C. § 1973 (1982). Illinois law requires the City Council of the City of Chicago to redistrict the city to equalize the population of its 50 wards before December 1 of the year following each census. ILL. REV. STAT. ch. 24, paras. 21-36, 38 (1981).

14. The census reported the city's population at 3,005,072. Divided among 50 wards, the equalized population to be obtained by redistricting was 60,101. Before redistricting, ward population varied from 40,979 to 77,342. See *Ketchum*, 740 F.2d at 1400; Stipulation of Facts ¶ 52.

of the city's black and Hispanic population. Over 92% of Chicago's black population resides in two cohesive and overwhelmingly black areas on the south and west sides of the city. There is little or no integration at the borders between white and black communities. Instead, sharply defined boundaries separate neighborhoods that are virtually all white from those that are virtually all black.<sup>15</sup>

The Chicago Hispanic population, while slightly more integrated, is itself concentrated in three culturally and geographically distinct communities. One segment of the Hispanic population, largely of Puerto Rican origin, resides on the near northwest side in neighborhoods known as Humbolt Park and West Town. A second Hispanic community, of predominantly Mexican origin, resides in the Pilsen area on the near southwest side. A third community of Chicago Hispanics, also of Mexican origin, is found in the Little Village neighborhood, which lies immediately to the west of Pilsen.<sup>16</sup>

Chicago's black and Hispanic neighborhoods had grown in population during the 1970s. For example, in 1970, blacks were in the majority in fifteen wards. By 1980, under the existing 1970 ward lines, blacks had grown to hold the majority in nineteen wards and a plurality in an additional ward.<sup>17</sup> Likewise, in 1970, there was no ward in which Hispanics held a majority. By 1980, again under the 1970 ward lines, there were four Hispanic majority wards and two wards in which Hispanics held a plurality. The remaining twenty-four wards had white majorities or pluralities.<sup>18</sup>

In the unfortunate tradition of Chicago politics, the City Council's 1981 redistricting process excluded all but a very few from the decision-making process. In late 1980, Alderman Thomas Casey,<sup>19</sup> purportedly without consulting any other aldermen, asked his old friend, former Alderman Thomas Keane,<sup>20</sup> to assist his City Council committee in the

15. *Rybicki I*, 574 F. Supp. at 1093-94 (boundaries referred to as "the wall").

16. *See id.* at 1095-96.

17. *Ketchum*, 740 F.2d at 1400.

18. *Id.* at 1400-01.

19. At the time, Alderman Casey was Chairman of the Committee on Committees and Rules. He was also alderman of the 37th ward. The black population of the 37th ward had grown from 12.5% to 76.3% in the decade of the 1970s. The ward map adopted by the City Council restored a substantial white majority to Alderman Casey's 37th ward. The boundary manipulations necessary to preserve the white majority of the 37th ward became a major feature of the trial and appeal.

20. Mr. Keane was no newcomer to Chicago redistricting. In fact, he had played a central role in the 1970 redistricting of the City Council. In a challenge to that redistricting, the Seventh Circuit found that then-Alderman Keane had been less than candid with the court in his testimony about the process used to prepare the map. *Cousins v. City Council*, 466 F.2d 830, 836 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972). In a subsequent appeal, the Seventh Circuit found that there was "considerable evidence" that ward lines in 1970 had been motivated by racial considerations. *See*

redistricting process. Without any public input, Martin R. Murphy, Commissioner of the City's Department of Planning, and former Alderman Keane prepared a draft ward map at their homes.<sup>21</sup> Although the map was completed in May 1981, and Mayor Jane Byrne was informed at that time that the map was ready, neither the map nor the supporting data was transmitted to the City Council. In fact, inquiring aldermen were told that no map was available.<sup>22</sup>

The redistricting materials were first sent to the City Council in October 1981. On October 19, 1981, each alderman was sent a packet of information containing maps and census figures for his or her existing ward and for the proposed ward. Although a city-wide map was available, that map was not distributed to the aldermen.<sup>23</sup> In fact, the process was designed to discourage aldermen from viewing the city-wide map. Aldermen who requested to see maps or demographics for the entire city were not permitted to do so. Aldermen who wished to change the configuration of their wards brought their proposed changes to Alderman Wilson Frost, the floor leader of the City Council, who set ground rules for considering proposed changes. An alderman was only permitted to propose changes that affected his or her own ward, and the proposed changes were incorporated only upon the consent of all aldermen whose wards were affected by the proposed change. In addition, to obtain Frost's support for the change, all aldermen whose wards would be affected by the change had to agree to vote for the final map as a whole.<sup>24</sup> Thus, aldermen were discouraged from inquiring into or challenging the city-wide implications of the map.

On November 9, 1981, the Redistricting Subcommittee of the Council's Rules Committee held its only public meeting on the proposed map.<sup>25</sup> While the proposed map for the city was publicly displayed for the first time, members of the Subcommittee were not provided with copies of the entire map or related population figures. Commissioner Murphy stated at that meeting that the proposed map included nineteen majority black wards. In fact, the November 9 map provided only eighteen majority black wards.<sup>26</sup>

At the November 9, 1981, meeting, little if any consideration was

Cousins v. City Council, 503 F.2d 912, 915 (7th Cir. 1974). In the intervening decade, Mr. Keane was convicted of mail fraud and removed from office.

21. Trial Stipulation ¶¶ 64, 65.

22. Trial Transcript at 1094, 1100-01, 1201-02, 1287-90, 1478.

23. *Ketchum*, 740 F.2d at 1398, 1401.

24. Trial Transcript at 1206-08, 1292, 1490, 1948.

25. *Ketchum*, 740 F.2d at 1401.

26. Trial Stipulation ¶ 87; Plaintiffs' Exhibits 61, 140.



given by the City Council to alternative ward maps, although such maps had been proposed by black and Hispanic groups.<sup>27</sup> Moreover, the Subcommittee took steps to cut off consideration of alternatives. An Illinois statute provided that within fifteen days of the passage of the redistricting ordinance, any ten aldermen opposed to the ordinance could propose a substitute ordinance and cause the ordinance and the proposed substitute to be submitted to a popular vote.<sup>28</sup> The Subcommittee, invoking Chicago's home rule powers, voted ten to three in favor of an ordinance which increased from ten to seventeen the number of aldermen required to sponsor an alternative ward map in a public referendum.<sup>29</sup> Because it was apparent that there would not be seventeen negative votes, this procedural maneuver foreclosed the presentation of an alternative ward map to the public in a referendum. Immediately following the Subcommittee meeting, the Rules Committee adopted the proposed map.

The November 9 map, with certain minor amendments, was approved by the City Council on November 13, 1981, by a vote of thirty-four to fifteen.<sup>30</sup> By a vote of twenty-two to seventeen, the Council also approved the ordinance increasing the number of aldermen required to sponsor an alternative map in a public referendum.<sup>31</sup> The City Council map was again presented to the full City Council on November 30, 1981, on a request for reconsideration. At that time, a number of minor amendments to the map were presented and approved in a single package.<sup>32</sup> There was no consideration by the Council of the merits of the individual amendments. Consistent with the intent of City Council leadership not to draw attention to the effect of the map on the city as a whole, at no time after November 9 were aldermen provided with any statistical or demographic data concerning the effect of the amendments on the racial or ethnic composition of any of the wards.

### *B. Challenges to the 1981 Redistricting*

In the summer of 1982, shortly after Congress adopted the amend-

27. *Ketchum*, 740 F.2d at 1401.

28. ILL. REV. STAT. ch. 24, paras. 21-39 (1981).

29. *Ketchum*, 740 F.2d at 1401.

30. Trial Stipulation ¶ 99. Significantly, many black aldermen who would later support plaintiffs voted for the November map. Whether unaware of its city-wide impact, or fearful of politically damaging reprisals, these several black aldermen, like their white counterparts, approved a ward map which undermined voting rights of blacks and Hispanics. Only the following aldermen voted against the City Council map on November 13, 1981: Evans, Bloom, Bertrand, Huels, Streeter, Sheahan, Kelley, Sherman, Lipinski, Davis, Marcin, Oberman, Merlo, Axelrod, and Orr. Journal of Proceedings, Chicago City Council 8077 (Nov. 12, 1981).

31. Trial Stipulation ¶ 100.

32. Trial Transcript at 1219-21. See *supra* note 10.

ments to the Voting Rights Act, a group of nine black voters, later known as "the Ketchum plaintiffs," filed a voting rights complaint against the City Council.<sup>33</sup> A group of six Hispanic voters, "the Velasco plaintiffs," soon filed a similar complaint complaining of the effects of the 1981 redistricting ordinance on Hispanic voting rights.<sup>34</sup> Later that summer, a group of four individuals and a black political organization, "the PACI plaintiffs," filed a similar complaint against the City Council and other individual defendants.<sup>35</sup> The three suits were consolidated, and the United States, through the Department of Justice, was granted leave to intervene as an additional plaintiff. The consolidated cases, originally assigned to Judge Milton I. Shadur, were later transferred to Judge Thomas R. McMillen after Judge Shadur recused himself.

At a trial which lasted from October 9, 1982, through December 7, 1982, plaintiffs presented evidence which revealed that the City Council had manipulated ward boundaries, fractured minority communities, packed minority voters into minority wards, diluted voting strength through retrogression, ignored non-discriminatory alternatives, and acted in an historical context of intense racial discrimination. This evidence, plaintiffs contended, demonstrated intentional discrimination prohibited by the fourteenth amendment, and constituted a violation of Section 2 of the Voting Rights Act.<sup>36</sup>

### 1. Manipulation of Ward Boundaries

Plaintiffs' evidence showed that the City Council map manipulated ward boundaries to protect white incumbents in wards that had become predominantly black or Hispanic, in order to maximize white voting strength and to minimize minority voting strength city-wide. Although whites represented only three percent more of the total population than blacks, the City Council map provided for seven more white majority wards than black majority wards. When voting-age population was con-

33. The *Ketchum* plaintiffs were Mars Ketchum, Suzanne Newhouse, Marlene Carter, Lewis White, Joseph Gardner, Lu Palmer, A.A. Raynor, Alderman Danny Davis, and Alderman Allen Streeter. Both Aldermen Davis and Streeter had voted against the 1981 redistricting ordinance, Alderman Davis speaking eloquently of its discriminatory effect on blacks and Hispanics.

34. The *Velasco* plaintiffs were Charmaine Velasco, Abel Del Toral, Maria Alma Alvarado, Idalia Hernandez, David Perez, and Reverend Jorge Morales. They were represented by counsel from the Mexican American Legal Defense and Educational Fund, the Puerto Rican Legal Defense and Education Fund, Virginia Martinez, Raymond Romero and by Robert Zaideman.

35. The *PACI* plaintiffs were the Political Action Conference of Illinois, Alderman Clifford Kelley, Alderman Larry Bloom, Alderman Martin Oberman, and Renault Robinson. They were represented by Judson Miner and Bridget Arimond from the law firm of Davis, Miner, Barnhill, and Galland.

36. 42 U.S.C. § 1973 (1982).

sidered, there were eleven more white majority wards than black majority wards under the City Council map. Hispanics, who represent fourteen percent of the total population, were given majorities in only eight percent of the wards under the City Council map. When voting-age population was considered, Hispanics had majorities in only four percent of the wards.<sup>37</sup>

Aside from this city-wide effect, the manipulation of ward boundaries to protect white incumbents and minimize minority voting strength was seen in particular wards. In the process of reducing the population in certain over-populated black majority wards to comply with the one person, one vote standard, a greater than necessary number of black persons were removed from the wards. At the same time, a large number of white persons were added to these wards, reducing or eliminating the black majorities therein and preserving the wards for the white incumbents.

For example, to comply with one person, one vote requirements, it was necessary to reduce the population in the 37th ward by approximately 17,000 from 77,342 to somewhere near the ideal population of 60,101. To accomplish this goal, the City Council removed over 40,000 people from the ward and added over 23,100 people to the ward, thereby changing a 76.4% black majority into a 44.0% white plurality and protecting the white incumbent. A similar result was achieved in several other black majority wards. The following table, which the Seventh Circuit incorporated into its opinion, demonstrates the dramatic manipulation of population and the results thereof:<sup>38</sup>

Ward	Old Map Total	(% Black)	Total Out	(% Black)	Total In	(% Black)	New Map Total	(% Black)
7	69,521	(62.6)	17,759	(82.2)	8,144	(74.4)	59,906	(58.4)
15	72,255	(66.4)	23,730	(96.7)	11,441	(0.0)	59,966	(41.7)
18	61,409	(49.3)	6,886	(98.7)	5,139	(81.4)	59,662	(46.4)
37	77,342	(76.4)	40,368	(96.1)	23,330	(8.2)	60,304	(36.8)

Hispanic majorities also were reduced or eliminated in the process of drafting the City Council map. The first draft of the map presented to the aldermen contained five Hispanic majority wards, the largest of which were the 22nd ward (72.87%) and the 33rd ward (59.52%). After a series of meetings with the incumbent white aldermen, the City Council reduced the Hispanic population of the 22nd ward to 64.38% and the Hispanic population of the 33rd ward to 31.46%.<sup>39</sup>

37. Plaintiffs' Exhibit 158.

38. *Ketchum*, 740 F.2d at 1407.

39. *Id.* at 1409.

## 2. Fracturing

Although Chicago's South Side black community contained ample population for fifteen to sixteen wards with black majorities in excess of 70%, the City Council map produced only thirteen black majority wards,<sup>40</sup> the minimum number of black majority wards that could have been created on the South Side.<sup>41</sup> The City Council's result was achieved by splitting off substantial amounts of black population from the edge of the cohesive black community and placing these blacks in the following neighboring wards:<sup>42</sup>

Ward	Black Population	Black % of Total Ward Population
10	16,363	27.2
11	12,491	20.8
14	15,293	25.5
15	25,000	41.7
18	27,667	46.4
19	8,765	14.7

In each of these six wards, whites held a majority of the voting-age population.<sup>43</sup>

The same pattern of fracturing occurred in the West Side black community. The City Council map provided only four black majority wards on the West Side, despite the fact that the area had ample population for five to six wards with black majorities in excess of 75%.<sup>44</sup> The Council accomplished this by splitting off substantial portions of the cohesive black community and placing them in the following surrounding wards:<sup>45</sup>

Ward	Black Population	Black % of Total Ward Population
1	23,066	38.4
22	11,937	20.1
25	16,246	27.0
37	22,213	36.8

Fracturing also decimated Hispanic voting strength on the Near Northwest Side. The Hispanic population was divided among six wards that radiate outward from the heart of this predominantly Puerto Rican community.<sup>46</sup> As a result, under the 1970 map, Hispanics comprised a

40. Plaintiffs' Exhibits 214-17.

41. Trial Transcript at 1047.

42. Plaintiffs' Exhibit 142.

43. *Id.* 153.

44. *Id.* 214-15.

45. *Id.* 142.

46. *Id.* 4.

slight majority of total population in only two of the six wards and a slight majority in voting-age population in only one of the wards.<sup>47</sup>

Ward	Hispanic Population	Hispanic % of Total Ward Population	Hispanic % of Voting Age Ward Population
26	31,768	52.3	43.7
30	14,443	24.1	19.1
31	34,481	57.3	52.4
32	28,315	47.2	39.6
33	21,379	35.5	29.4
35	18,890	31.5	25.8

The two predominantly Mexican-American communities on the Near Southwest Side also were fractured. The geographically and culturally cohesive Hispanic neighborhood of Pilsen was split between the 1st ward, which became 30.7% Hispanic, and the 25th ward, which was left with a bare Hispanic majority of 52.6%. Similarly, a substantial portion of the Little Village neighborhood, which had been entirely within the 22nd ward under the 1970 map, was placed in the 12th ward. Under the City Council map, the 12th ward was 32.0% Hispanic and the 22nd ward was 64.8% Hispanic.<sup>48</sup>

Although the black and Hispanic communities were fractured under the City Council map, there was no comparable treatment of white residents of the city. Statistical analyses performed by noted University of Chicago sociologist Dr. Philip Hauser demonstrated that, whereas 15.4% of all blacks were placed into wards with a white voting-age majority, only 3.9% of all whites ended up in wards with a black voting-age majority. Similarly, only 1.6% of all whites were placed in wards with a Hispanic voting-age majority while 58.2% of all Hispanics were placed in wards with white voting-age majorities.<sup>49</sup> The probability of a black being placed in a ward with a white voting-age majority, therefore, was 4.47 times greater than the probability of a white being placed in a ward with a black voting-age majority. The probability of a Hispanic being placed in a ward with a white voting-age majority was 48.68 times greater than the probability of a white being placed in a ward with a Hispanic voting-age majority.

These differences become even more pronounced when one focuses on the twenty wards that crossed an imaginary line encircling all contiguous majority black and/or Hispanic census tracts.<sup>50</sup> Dr. Hauser testi-

47. *Id.* 142, 153.

48. *Id.* 142.

49. *Id.* 168.

50. In many parts of the city of Chicago, the drawing of ward lines can be done without regard

fied that these border-crossing wards were significant because the physical proximity of the minority population groups put them at greater risk of being manipulated to strengthen or dilute votes. Only 2% of whites in border-crossing wards were in wards with a black voting-age majority, while 44.4% of blacks and 56% of Hispanics in border-crossing wards were placed in wards with a white voting-age majority. In border-crossing wards, therefore, blacks were 33.67 times as likely to be placed in white majority wards as whites were to be placed in black majority wards.<sup>51</sup>

### 3. Packing

Plaintiffs' evidence showed that packing was also used by the City Council to dilute minority voting strength. Due to the size of the city's black population, it was inevitable that many wards would be black-controlled. The City Council, however, reduced their number by "packing" black residents into a small number of wards, making a ward all black, or else majority white. Thus, comparing voting-age population under the City Council map, the black population exceeded 89% in fourteen of the seventeen wards in which blacks were a majority of the total population. In only six of the twenty white-majority wards was the white population 89% or more of the total population.<sup>52</sup> The alternatives proposed by plaintiffs contained as many as twenty-two black wards. Instead, the City Council map contained seventeen. Thus, by packing black citizens into the smallest number of wards, the Council reduced black representation below what it could have been had citizens of both races been treated equally.

### 4. Retrogression

Retrogression occurs when a new districting plan or voting scheme decreases "the number of representatives which a minority group has a fair chance to elect."<sup>53</sup> In the case of the Chicago redistricting, retrogression was inconsistent with the prior decade's increase in minority population. Plaintiffs showed retrogression by comparing the voting strength of

for race because the entire area is racially homogeneous. However, in those areas in which racially segregated neighborhoods abut, identified by Dr. Hauser as "border-crossing wards," the treatment of racial groups reveals the City Council's methodology. The City Council map included many wards in which ward boundaries crossed racial lines. As Dr. Hauser showed, black and Hispanic residents were far more likely to be made a minority in an overall white ward than white residents were to receive similar treatment.

51. Plaintiffs' Exhibit 171.

52. Defendants' Exhibit 7 B-I.

53. *Ketchum*, 740 F.2d at 1402 n.2.

blacks and Hispanics under the 1970 ward map and the City Council map using the 1980 census figures. The 1981 City Council map was retrogressive on a city-wide basis because it provided only seventeen wards with black majorities. Prior to the adoption of the City Council map, blacks were in the majority in nineteen wards.<sup>54</sup>

In addition to this city-wide retrogression, plaintiffs also showed retrogression of minority voting strength within particular wards under the City Council map. The 7th, 15th, 18th, and 37th wards had been white majority wards in 1970 and had become black majority or plurality wards by 1980. The black population in each of these wards was severely reduced under the City Council map:<sup>55</sup>

Ward	% Black Population 1980 Old Wards	% Black Population 1980 New Wards
7	62.6%	58.4%
15	66.4%	41.7%
18	49.3%	46.4%
37	76.4%	36.8%

### 5. Alternative Maps

Plaintiffs also demonstrated that the City Council could have adopted a redistricting plan that did not manipulate existing boundaries to preserve white incumbencies or result in the fracturing, packing, and retrogression described above. Plaintiffs presented three alternative maps that remedied the fracturing of black and Hispanic communities, the packing of the black community, and the retrogression both city-wide and within particular wards, all without diluting white voting strength. The alternative maps provided twenty-three or twenty-four white majority wards, twenty to twenty-two black majority wards, and five Hispanic majority wards.<sup>56</sup>

The alternative maps created minority populations of 65% or more in each of the black majority wards. During the trial, witnesses for both sides testified that 65% of a total population is a widely recognized and accepted guideline for minority populations in redistricting.<sup>57</sup> By assuring 65% minority population, the alternative proposals made minority voting power "effective." The City Council's own expert, Kimball Brace, stated that, on the average, Hispanics in Chicago needed to comprise 70% to 74% of total population to have a meaningful opportunity to

54. *Id.* at 1402.

55. Plaintiffs' Exhibits 137, 142. *See also Ketchum*, 740 F.2d at 1418.

56. Plaintiffs' Exhibits 146-48; FED. R. CIV. P. 52(a).

57. Trial Transcript at 2202-04, 3665-66.

elect candidates of their choice.<sup>58</sup>

## 6. Other Factors

The plaintiffs also demonstrated the existence of a number of additional factors which are known collectively as the *Zimmer-White* factors.<sup>59</sup> In the legislative history of the 1982 Amendments to the Voting Rights Act,<sup>60</sup> congressional committees identified these factors as relevant to the totality of the circumstances to be evaluated when enforcing the Voting Rights Act.<sup>61</sup>

Plaintiffs' evidence established the existence of many of these factors in the city of Chicago. Plaintiffs made a showing of racially polarized voting; historical discrimination in electoral matters; racial discrimination in areas such as housing, education, and employment; a lack of access by minorities to the candidate slating process; and a lack of responsiveness on the part of elected officials to the particularized needs of minorities.<sup>62</sup>

## C. District Court Ruling

On December 21, 1982, the district court rendered its oral opinion. Despite the complexity of the case and the voluminous record of testimony and exhibits, the court declined to accept proposed findings of fact and conclusions of law. The court questioned the applicability of Section 2 of the Voting Rights Act to redistricting cases and opined,<sup>63</sup> incorrectly, that the legislative history of Section 2 "[said] nothing about redistricting or diluting the votes of minorities."<sup>64</sup> Nevertheless, the district court ultimately concluded that the City Council had in fact violated Section 2 of the Voting Rights Act.

58. *Id.* at 3817.

59. *Ketchum*, 740 F.2d at 1405.

60. Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (1982)).

61. S. REP. NO. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 206-07. Congress had directed courts to consider the "totality of the circumstances" in applying Section 2. The Supreme Court in *White v. Regester*, 412 U.S. 755 (1973), and the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976), had developed a list of objective factors relevant to the determination of voting rights discrimination. These factors, known as the *Zimmer-White* factors, include any history of discrimination, racially polarized voting, voting practices that may enhance the opportunity for discrimination, such as unusually large districts, minority access to the candidate slating process, overt or subtle racial appeals in recent elections, and success of minority candidates. The factors are described in detail in *Ketchum*, 740 F.2d at 1404-05 & n.5.

62. *Ketchum*, 740 F.2d at 1405.

63. Trial Transcript at 4077-123.

64. *Id.* at 4092. The Seventh Circuit demonstrated the error of the district court's statement. See *Ketchum*, 740 F.2d at 1404 (citing legislative history).



The district court declared that Section 2 was violated only by defects in the redistricting plan as a whole.<sup>65</sup> The district court rejected plaintiffs' evidence of fracturing, packing, retrogression within individual wards, and manipulation of ward boundaries. Fracturing and packing were permissible, the court held, and even inevitable, in light of the growth of black and Hispanic populations.<sup>66</sup> Moreover, the court deemed fracturing and packing to be excusable where performed to allow white aldermen to save their incumbency, even at the expense of the rights of black voters.<sup>67</sup> The sole basis of the district court's finding that the City Council's map violated Section 2 was the city-wide retrogression based on a comparison of the number of black and Hispanic majority wards before and after redistricting.

After finding a violation, the district court turned its attention to fashioning a remedy. The court directed the City Council's lawyers to revise the map to create a simple majority of black voting-age population in two additional wards, a simple majority of Hispanic voting-age population in three wards and a plurality of Hispanic voting-age population in another ward. Finally, noting the large number of Mexicans who were not citizens and, therefore, unable to vote, the district court directed the City Council's lawyers to provide a 55% Hispanic voting-age population in another ward.<sup>68</sup>

Two days later, the City Council's lawyers presented a revised map to the court. The revised map was not the result of a legislative process, for the members of the City Council did not consider the map before it was presented. The black and Hispanic plaintiffs, joined by the Department of Justice, objected to the revised map on the ground that it failed to remedy the deprivations of voting rights suffered by black and Hispanic voters. The plaintiffs also objected to the consideration of the map without an evidentiary hearing to establish whether it cured the violations of Section 2. Moreover, plaintiffs pointed out that the revised map did not even comply with the guidelines stated in the district court's oral opinion.<sup>69</sup> Nonetheless, the district court adopted the revised map on December 27, 1982, over the objections of the plaintiffs and the Department of Justice and without an evidentiary hearing.<sup>70</sup>

65. Trial Transcript at 4104.

66. *Id.* at 4101-02.

67. *Id.* at 4101.

68. *Id.* at 4107-13.

69. *Id.* at 4140-43.

70. *Id.* at 4202.

### *D. Seventh Circuit Appeal*

Despite prevailing on the issue of defendants' liability at trial and obtaining a judicial redistricting which altered the ward boundaries of some of the wards most severely affected by the City Council's 1981 remap, all three plaintiff groups appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit.<sup>71</sup> The plaintiffs explained to the Seventh Circuit that while they agreed with the district court's finding of liability,<sup>72</sup> the court of appeals should broaden both the district court's theory of liability and its selection of a remedy.<sup>73</sup>

The plaintiffs complained that the district court's liability theory was too narrow,<sup>74</sup> and asked the court of appeals to expand the district court's finding of a violation of the Voting Rights Act beyond city-wide retrogression to include fracturing, packing, and boundary manipulation in individual wards.<sup>75</sup> Moreover, plaintiffs asked the court of appeals to find that evidence of these practices, as well as evidence of racially polarized voting, race-conscious slate-making, and official discrimination in housing, education, and employment in the city of Chicago, proved an intentional violation of voting rights.<sup>76</sup>

The plaintiffs also contended that the court-ordered remap was insufficient to remedy even the violations identified by the district court, let alone the extensive violations of voting rights which the plaintiffs asked the Seventh Circuit to recognize.<sup>77</sup> Significantly, plaintiffs asked the Seventh Circuit to restore minority voting strength in the affected wards to more than the "barest majority possible."<sup>78</sup> A simple majority, the plaintiffs argued, did not restore minority populations within the altered wards to their pre-violation voting strength and did not provide minority residents of those wards a meaningful opportunity to obtain effective rep-

71. The United States, plaintiff intervenors in the district court, did not appeal. At one point during the appellate process, plaintiffs' counsel were advised that the Department of Justice intended to file a brief in the Seventh Circuit, and it was strongly intimated that the Department's brief would support the district court's remedy, notwithstanding its earlier opposition to the remedial map. After intensive lobbying efforts, the Department decided not to file a brief in the Seventh Circuit.

72. Because the City Council did not cross-appeal, no party challenged the district court's finding of liability. Therefore, in proceedings before the Seventh Circuit, the United States Supreme Court, and on remand, it was undisputed that the 1981 redistricting unlawfully diluted the voting strength of minority residents of the city of Chicago. The remaining question was how best to define the violation and its remedy.

73. Brief for Appellant at 5.

74. *Id.* at 64-76.

75. *Id.* at 64-72.

76. *Id.* at 72-76. While a finding of intentional discrimination may not have had much impact on the remedy chosen in this proceeding, it could have subjected future ward redistricting plans to Department of Justice preclearance. 42 U.S.C. § 1973a(c) (1982).

77. Brief for Appellant at 76-81.

78. *Id.* at 78.

resentation. Based on expert witness testimony presented to the trial court,<sup>79</sup> plaintiffs advised the Seventh Circuit that minority population within the relevant wards must exceed 65% to be an effective majority and to provide a meaningful opportunity to elect candidates of their choice in local elections.<sup>80</sup> The 65% figure, which plaintiffs derived from guidelines used by the Department of Justice,<sup>81</sup> recognized the fact that minority populations tend to be younger, have lower rates of registration, and have lower voter turnout, the latter two being lingering effects of past political disenfranchisement.<sup>82</sup> The 65% super-majority was based on the "rule of thumb" that an additional 5% minority population was needed to correct each of these factors; if voting-age population was considered, only a 60% majority was needed, the 5% attributable to the youth of minority population already having been considered.<sup>83</sup>

Defendants disputed plaintiffs' liability and remedy arguments. Relying on Rule 52's clearly erroneous review standard, the City Council defended the district court's factual findings which it characterized as a "cogent analysis of the evidence."<sup>84</sup> The City Council also complained that plaintiffs simply, and improperly, attempted through the appeal to increase minority voting strength in a manner not supported by the evidence.<sup>85</sup> On the question of remedy, the City Council argued that the 65% guideline proposed by plaintiffs was unsupported in law or in fact. No court had required that a 65% standard be used to correct city-wide retrogression and the Council contended that the factual record from the trial did not support the 65% guideline in this case.<sup>86</sup> The City Council cited particular instances in which minority voting strength reached the suggested levels or in which minority candidates had been elected at lower percentages.<sup>87</sup> Finally, in an effort to apply the "totality of the

79. Trial Transcript at 2202-04, 3665-66.

80. Brief for Appellant at 78.

81. *Id.* See also *United Jewish Orgs. v. Carey*, 430 U.S. 144, 165-66 (1977) (discussing Department of Justice preclearance procedure).

82. *Rybicki I*, 574 F. Supp. at 1113 n.87.

83. Plaintiffs contended further that a Hispanic population majority in excess of 70% was necessary to permit Hispanic candidates a reasonable opportunity to win. The higher percentage was necessary to reflect the noncitizen population of Hispanic communities. In Puerto Rican neighborhoods, where the residents are already citizens, this additional 5% corrective was not necessary.

84. The district court had declined plaintiffs' offer to submit proposed findings of fact and conclusions of law and, in an unusual procedure in a case of this complexity, delivered its opinion orally, and seemingly extemporaneously, to the parties. Although neither the Court of Appeals nor the Supreme Court addressed this issue, the parties debated whether this opinion was entitled to appellate court deference pursuant to Federal Rule of Civil Procedure 52(a).

85. Brief for Appellee at 41.

86. *Id.* at 42-48.

87. *Id.* at 42 & n.\*. For example, the City Council referred to the election of Mayor Harold Washington despite the minority status of black voters.

circumstances" test established in the 1982 amendments to the Voting Rights Act,<sup>88</sup> the City Council addressed the *Zimmer-White* factors<sup>89</sup> and argued that they supported the decision of the district court below.<sup>90</sup>

### 1. The Initial Seventh Circuit Opinion

On May 17, 1984, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the district court on the liability issue, but reversed the lower court on the question of remedy.<sup>91</sup> Judge Cudahy, joined by visiting Senior District Judge Robert J. Kelleher, formed the court's majority; Circuit Judge Harlington Wood concurred separately.<sup>92</sup> The court approved the district court's decision that Section 2 had been violated by the city-wide retrogression in the number of wards with black majorities,<sup>93</sup> although it declined to rule whether the City Council had engaged in intentional discrimination.<sup>94</sup> The Seventh Circuit rejected the district court's remedy, though, holding that the remedy failed to cure the minority vote dilution which had occurred through the illegal redistricting.

In its discussion of the intentional discrimination, the court rejected the district court's rationalization that the City Council's action was simply the protection of incumbencies, rather than racial discrimination.<sup>95</sup> The court reasoned that drawing ward boundaries around certain racial groups because they opposed an incumbent politician was racial discrimination, even if it also served the incumbent's political agenda.<sup>96</sup> The court also rejected the district court's conclusion that the manipulation of ward boundaries, fracturing, and packing to dilute minority voting strength was not actionable.<sup>97</sup> Despite the court's close analogy between

88. 42 U.S.C. § 1983 (1986).

89. See *supra* note 61.

90. Brief for Appellee at 50-74.

91. *Ketchum*, Nos. 83-2044, 83-2065, and 83-2126, slip op. (7th Cir. May 17, 1984). This opinion was later withdrawn and replaced with an amended opinion. See *infra* text accompanying notes 109-17.

92. *Ketchum*, at 40 (Wood, J., concurring).

93. *Id.* at 8-15.

94. *Id.* at 15-23.

95. *Id.* at 16-20.

96. *Id.* at 19-20. The Seventh Circuit did not formally upset the district court's finding that the protection of incumbencies was the City Council's motivation. Instead, the Seventh Circuit criticized the district court's reasoning and referred to the conclusion of the three-judge panel in *Rybicki I* that "[s]ince it is frequently impossible to preserve white incumbencies amid a high black-percentage population without gerrymandering to limit black representation, it seems to follow that many devices employed to preserve incumbencies are necessarily racially discriminatory." *Id.* As a result, the Seventh Circuit saw "little point" in distinguishing discrimination intended to protect white incumbents from "discrimination borne of pure racial animus." *Id.* at 20.

97. *Id.* at 18-19.

the facts of this case and of other cases in which intentional discrimination had been found,<sup>98</sup> the court declined to decide whether intentional discrimination had been proven,<sup>99</sup> asserting that there was no practical difference in the remedy needed to correct intentional discrimination and unintentional discrimination.<sup>100</sup>

It was the Seventh Circuit's discussion of the appropriate remedy, however, that engendered controversy and prompted the separate concurring opinion of Judge Wood. All three judges agreed that the district court abused its discretion by failing to provide a remedy that corresponded to the full magnitude of the proven violation of Section 2 of the Voting Rights Act. The judges divided, however, on plaintiffs' request for a 65% super-majority. The majority held:

We believe that the district court's failure to consider carefully all of the factors which are present here as in comparable situations and of which led other courts to employ a 65% approach or some variation on that figure was an abuse of discretion under the particular circumstances before us.<sup>101</sup>

The Seventh Circuit held that on remand the district court must follow either the 65% guideline or its equivalent. The Seventh Circuit directed the district court to give the 65% guideline "most careful consideration" and take into account the factors on which the 65% super-majority is based "more faithfully" than it had before.<sup>102</sup>

In his concurring opinion, Judge Wood took issue with the majority's emphasis on the 65% figure.<sup>103</sup> Judge Wood commented that while the 65% guideline may in some circumstances be appropriate, the dynamics of political change at the local level, particularly in Chicago, suggest that successful minority political participation may continue without a super-majority and that the use of a super-majority could actually be a disincentive to minorities to overcome past impediments to political

98. *Id.* at 17-19. The Seventh Circuit relied primarily on the decision of the three-judge panel in *Rybicki I.*

99. *Id.* at 22-23. After undertaking a detailed analysis of the evidence of intentional discrimination, the court concluded "[w]e think it undesirable to undertake this difficult analysis [of determining intentional discrimination] when Congress has rendered it superfluous by amending the Voting Rights Act." *Id.* at 22. Despite not upsetting the district court's *holding*, the court clearly was troubled by the district court's narrow view of liability.

100. *Id.* at 22.

101. *Id.* at 29. The Seventh Circuit reviewed in great detail the evidence presented to the district court supporting a 65% super-majority, highlighting each expert witness who testified that such a corrective was necessary to give effective voting strength to minority populations, *id.* at 31-32 & n.17, and describing prior judicial opinions in which a 65% guideline figure had been adopted as a baseline for effective minority voting strength. *Id.* at 33.

102. *Id.* at 33-34.

103. *Id.* at 40 (Wood, J., concurring).

participation.<sup>104</sup>

The City Council promptly filed a petition for rehearing with suggestion for rehearing en banc. City politics, however, were soon to intervene. Between the time the City Council filed its initial brief on appeal in August 1983 and the Seventh Circuit's decision, the City Council had been publicly divided by racial politics and a majority of the City Council opposed the policies of newly-elected Mayor Harold Washington. Before the Seventh Circuit could act on the petition for rehearing, the new Corporation Counsel of the City of Chicago attacked the City Council's power under state law to contest the Seventh Circuit's decision.

The Corporation Counsel notified the private attorney retained by the City Council in 1982 to defend the redistricting cases, that his authority to represent the City Council in the litigation had been terminated and that the Corporation Counsel would now exercise its statutory authority to defend the City of Chicago in litigation. Illinois statutes and Chicago ordinances establish the Corporation Counsel as the legal representative of the City and the City Council.<sup>105</sup> Based on the amount of money spent to date in the defense of the action,<sup>106</sup> the Corporation Counsel stated that perpetuating the litigation was not in the interests of the City of Chicago and that the petition for rehearing should be stricken. The Corporation Counsel's motion provoked a strong response from the private attorney representing, or in the view of the Corporation Counsel, formerly representing, the City Council. The City Council's attorney contended that he had been asked by the City Council to represent it and that until a majority of the City Council, rather than the Corporation Counsel appointed by the Mayor, terminated that representation, he would remain empowered to act as the City Council's attorney.<sup>107</sup> Moreover, the City Council, through its private attorney, contended that the Corporation Counsel's action was incorrect as a matter of state law and violated the wishes of a majority of the members of the City Council in whose interests he purported to act.<sup>108</sup>

104. *Id.* Unlike the majority, which saw the 65% guideline as a necessary element of remedy, Judge Wood concluded that "some percentage adjustment may be justified in some wards at this time, but only with the expectation that any adjustment will serve only as a temporary educational stepping stone for minorities in reaching their full political potential." *Id.*

105. See ILL. REV. STAT. ch. 24, paras. 3-7-1, 21-11 (1985); CHICAGO, ILL., MUNICIPAL CODE § 6-2 (1984).

106. According to the City Council's Motion to Strike, nearly \$600,000 had been spent so far defending the City Council and other city defendants. Moreover, plaintiffs' fee demands, ultimately compensable under 42 U.S.C. §§ 1973, 1976 & 1978, already exceeded \$1,000,000.

107. Response of the City Council of the City of Chicago and Attorney William J. Harte to "Motion to Strike Petition for Rehearing with Suggestion for Rehearing En Banc" at 11-20.

108. *Id.*

## 2. The Revised Seventh Circuit Opinion

On August 14, 1984, the panel withdrew its original opinion<sup>109</sup> and issued an amended opinion.<sup>110</sup> The amended opinion, in which Judge Wood now joined, contained the same discussion of liability, intentional discrimination, and the protection of incumbencies, and the same analysis of the totality of the circumstances reflected in the *Zimmer-White* factors as did the original opinion.<sup>111</sup> The amended opinion, however, contained a significantly different discussion of remedy.

Like the original opinion, the amended opinion was based on the holding that the district court had "not provided an adequate remedy for the Voting Rights Act violation because it [did] not eliminate, in accordance with well-accepted principles of redistricting, the illegal dilution of minority voting strength."<sup>112</sup> Significantly, however, the Seventh Circuit changed its approach to the 65% guideline. Whereas previously the panel had held that the district court abused its discretion by not adopting the 65% guideline, the court now held only that other courts, in comparable situations, had employed a corrective such as the 65% guideline and that the district court did not adequately address the arguments supporting such a remedy.<sup>113</sup>

The Seventh Circuit directed the district court on remand to gather and evaluate whatever statistical evidence it could to determine whether a super-majority should have been used and if so, the population level at which minority voting strength becomes effective.<sup>114</sup> The court concluded:

As we have indicated, of course, emerging changes in sociological and electoral characteristics of minority groups and broad changes in political attitudes may substantially alter, or eliminate, the need for a corrective. The 65% figure, in particular, should be reconsidered regularly to reflect new information and new statistical data.<sup>115</sup>

The mandate of the amended opinion was, therefore, much less focused than the initial opinion. Rather than being *directed* to consider and use a 65% guideline, the district court was instructed to consider all available evidence in an effort to determine whether any such corrective was justified by the facts of this particular case.

In the amended opinion, as in its prior opinion, the panel refused to

109. *Ketchum*, 740 F.2d at 1398 n.\*.

110. *Id.* at 1398.

111. *See id.*

112. *Id.* at 1412.

113. *Id.* at 1413.

114. *Id.* at 1414-15.

115. *Id.* at 1416 (footnote omitted).

order the district court to restore the minority population in each ward to its pre-redistricting strength, holding that such an approach would be too inflexible. However, the panel observed that there was "a certain equity" in the plaintiffs' argument that retrogression within wards should be corrected.<sup>116</sup> The court held that "if the original majority is not restored, then the most relevant change is one *downward* from the pre-redistricting percentage previously achieved by the minority group rather than one *upward* from the map formulated by the City Council action which was found to be in violation of the Voting Rights Act."<sup>117</sup> This statement was critical to understanding the Seventh Circuit's remedial order; the district court was to try to eliminate downward changes of minority representation from pre-redistricting strength in developing a new map, rather than to try to boost minority voting strength upward from the City Council map to a pre-ordained level, such as 65%.

After the panel issued its amended opinion, the City Council renewed its request that the court rehear the case en banc. On September 10, 1984, the Seventh Circuit denied the City Council's petition. The court never addressed the Corporation Counsel's motion to strike the City Council's petition for rehearing as unauthorized under state law.

#### *E. Proceedings in the Supreme Court*

The City Council, again through its private attorney, petitioned the United States Supreme Court to issue a writ of certiorari to the Seventh Circuit to review the case.<sup>118</sup> The City Council asserted that the amended opinion had improperly rejected the district court's factual finding that 50% voting-age population comprised effective minority voting strength within a ward.<sup>119</sup> The City Council further complained that the Seventh Circuit failed to address the *Zimmer-White* factors and erroneously reversed the district court's remedial plan.<sup>120</sup> In response, plaintiffs argued that the Seventh Circuit did not ignore factual findings and that its guidelines on remand did not warrant review in the United States Supreme Court.<sup>121</sup> Moreover, due to the interlocutory posture and fact-specific nature of the Seventh Circuit's decision, which did not directly

116. *Id.* at 1414.

117. *Id.* (emphasis in original). The panel thus directed the district court to scrutinize any deviations from pre-redistricting ward strength more closely than the direction or amount of particular changes from the court-approved map.

118. *Ketchum*, 740 F.2d 1398 (7th Cir.), petition for cert. filed, 53 U.S.L.W. 3343 (U.S. Oct. 18, 1984) (No. 84-627).

119. *Id.* at 10-15.

120. *Id.* at 15-28.

121. Brief of Plaintiffs in Opposition.



conflict with any prior decision of the United States Supreme Court or the other circuit courts, plaintiffs argued that review in the Supreme Court was inappropriate at that time.<sup>122</sup> The Corporation Counsel filed a separate brief in opposition to certiorari, stating that the City Council, through private counsel, lacked authority to take a legal position for the City of Chicago for the same reasons stated in his motion to strike filed in the court of appeals. The Corporation Counsel also defended the decision of the Seventh Circuit.<sup>123</sup>

The United States Supreme Court invited the Solicitor General to express his views on the petition.<sup>124</sup> The Solicitor General agreed with plaintiffs that the case was not appropriate for Supreme Court review, noting that the Seventh Circuit's opinion did not require a super-majority but only instructed the district court to consider one. As a result, the Solicitor General urged that review by the Supreme Court would be interlocutory and, depending on the proceedings on remand, perhaps unnecessary.<sup>125</sup> The Solicitor General also argued that because the district court's analysis of the violation of voting rights was flawed, the question of remedy presented to the Supreme Court was hypothetical and premature.<sup>126</sup>

On the question of the proper remedy, the Solicitor General noted that while the Department of Justice was of the view that certiorari should be denied, it had "serious reservations" about the Seventh Circuit's view of the need for the creation of super-majority wards.<sup>127</sup> The Solicitor General stated that the Department of Justice did not, contrary to the assertions of plaintiffs' experts below, attach any particular significance to the 65% guideline,<sup>128</sup> and that recent summary affirmances by the Supreme Court in voting rights cases indicated that a 65% super-majority was not required as a matter of law.<sup>129</sup> The Solicitor General thus distinguished the prior use by the Department of Justice of the 65%

122. *Id.* at 27-30.

123. Brief of the Corporation Counsel of the City of Chicago on Behalf of the City Council of Chicago in Opposition.

124. 469 U.S. 1031 (1984).

125. Brief for the United States as Amicus Curiae at 7-8.

126. *Id.* at 15-20.

127. *Id.* at 9.

128. *Id.* at 10.

129. *Id.* at 10-14. The Solicitor General attached particular significance to the Court's summary affirmances in *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984) (three-judge panel), *aff'd sub nom.* *Allain v. Brooks*, 469 U.S. 1002 (1984), and *Strake v. Seamon*, 469 U.S. 801 (1984), in which the trial courts had refused to adhere to a 65% guideline. See *infra* note 159 and accompanying text. The Solicitor General also contended that legislative history of the 1982 Amendments undermined the view that the 65% guideline was a required definition of effective minority voting strength. See 128 CONG. REC. H3844 (daily ed. June 23, 1982).

guideline in pre-clearance cases<sup>130</sup> as inapplicable in redistricting cases. Fundamentally, the Solicitor General argued that the Seventh Circuit's approach reflected the intent to protect minority groups from defeat at the polls rather than the congressional intent to remedy obstacles to political participation.<sup>131</sup> Based on extensive legislative history indicating that Section 2 was passed to provide equal access to the electoral process rather than proportional representation, the Solicitor General concluded that the Seventh Circuit erred in focusing on "effective majorities" rather than the elimination of barriers to equal opportunity.<sup>132</sup>

Despite these alleged errors, however, the Solicitor General concluded that the case should not be heard by the Supreme Court. Agreeing with the plaintiffs, the Solicitor General stated that the evidence of fracturing, packing, and boundary manipulation proved a violation of Section 2 of the Voting Rights Act and that the remedy for that violation was to replicate, as near as possible, the ward map which would have been drawn but for the illegal conduct of the City Council.<sup>133</sup> Because the contours for this remedy were, like the violation itself, not clearly developed by the decisions of the district court and the Seventh Circuit, the Solicitor General agreed that the case should not be reviewed by the Supreme Court.

On June 3, 1985, the United States Supreme Court denied the petition for a writ of certiorari.<sup>134</sup>

#### *F. Proceedings on Remand*

On remand, the case was assigned to Judge Charles R. Norgle, who established a schedule for discovery and set the case for trial on November 4, 1985. The Corporation Counsel again moved to participate as the sole legal representative of the City of Chicago. After briefing and argument, Judge Norgle granted the motion and substituted the Corporation Counsel as the legal representative of the City Council.<sup>135</sup> Judge Norgle later permitted intervention by the twenty-five aldermen who previously had supported the private representation of the City Council, certain voters, and residents of the affected wards.<sup>136</sup>

In the months and weeks prior to the November trial date, the par-

130. *See supra* notes 81,129.

131. Brief for the United States as Amicus Curiae at 13.

132. *Id.* at 13-14.

133. *Id.* at 16-17.

134. *City Council v. Ketchum*, 471 U.S. 1135 (1985).

135. *Ketchum v. City Council*, 630 F.2d 551, 555 & n.11 (N.D. Ill. 1985).

136. *Id.* at 555 & n.12, 556. As a result, plaintiffs and the defendant City Council, represented by Harold Washington's Corporation Counsel, became aligned against the defendant-intervenors,

ties, assisted by the United States as intervenor, engaged in settlement negotiations. By the trial date, the parties, with the exception of individual intervenors from two wards, reached agreement in principle on a compromise ward map.<sup>137</sup> The settlement map created four majority Hispanic wards,<sup>138</sup> returned the 37th ward to its pre-1981 status as a significantly majority black ward,<sup>139</sup> and increased the percentage of black population in the 15th and 18th wards.<sup>140</sup> The court conducted a hearing in which the parties presented evidence in support of the settlement. Certain intervenors opposed to the settlement map complained that the settlement removed political leaders from the wards, and changed wards they believed were lawful. In addition, one intervenor complained that the remap resulted in the fracturing of a white ethnic community.<sup>141</sup> The district court took the objections under advisement and on December 27, 1985, issued a detailed opinion affirming the settlement map.<sup>142</sup> The court concluded that the compromise remedied the proven violation of Section 2 of the Voting Rights Act and complied with the remand instructions of the Seventh Circuit.<sup>143</sup>

### G. Special Elections

While the parties reached agreement on the configuration of the compromise ward map, they remained divided on the issue of whether special elections were a necessary component of the remedy. Plaintiffs, joined by the City Council and ultimately the United States,<sup>144</sup> requested the district court to order special elections in the seven wards most signifi-

who were members of the City Council opposed to the Mayor. "Council Wars" were fought in federal court as well.

137. *Id.* at 556 & n.13. The settlement negotiations focused on the minority population to be created in seven wards. The parties first reached agreement on the overall population percentages. Subsequent negotiations and analysis of census information were necessary to draw final ward maps.

138. *Id.* at 558. These wards (and their Hispanic populations) were 22 (78.1%), 25 (72.9%), 26 (64.2%), and 31 (59.6%).

139. *Id.* at 560. Prior to redistricting, the 37th ward was over 76% black. The City Council reduced the population to 36.84%, and the district court originally restored it to 61.65%. The compromise map increased the black population to 80.4%.

140. *Id.* at 560-62. The 1985 compromise increased black population to 74.5% in the 15th ward and to a bare majority (and voting-age minority) in the 18th ward.

141. *Id.* at 560. The Supreme Court had previously held that white ethnic groups are not subject to the protection of the Voting Rights Act. *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977).

142. *Ketchum v. City Council*, 630 F. Supp. 551 (N.D. Ill. 1985).

143. *Id.* at 564.

144. *Id.* Originally, representatives of the Department of Justice opined to plaintiffs' counsel that the Department would take no position on the special election issue because Department officials saw the issue as more political than legal. The Department of Justice trial lawyers, however, were strongly of the view that special elections were warranted. After a meeting between plaintiffs' counsel and William Bradford Reynolds, then Assistant Attorney General in charge of the Civil Rights Division, the Department of Justice agreed to support plaintiffs' request for special elections.

icantly affected by the remap.<sup>145</sup> Plaintiffs contended that the district court had the power and the duty not only to prevent discrimination in the future but to eliminate the effects of past discrimination.<sup>146</sup> Intervenor-ors opposed special elections.

Applying the standard established by the Seventh Circuit in *Smith v. Cherry*,<sup>147</sup> the court held that special elections were appropriate if (1) there had been a serious and substantial deprivation of voting rights; (2) there was a reasonable possibility that the violation affected the outcome of challenged elections; and (3) the plaintiffs had exercised due care in seeking relief in advance of the challenged election.<sup>148</sup> The second and third factors did not detain the district court long. There was no evidence that plaintiffs had bypassed pre-election relief and it was clear that the dilution of minority voting strength affected the outcome of elections of aldermen and committeemen in the seven wards.<sup>149</sup> In fact, the Seventh Circuit had already held that the prior map did not provide effective minority voting strength.

The only dispute was over the characterization of the violation of voting rights. While it was clear that the 1981 remap was a substantial deprivation of voting rights, elections had been held in 1983 and 1984 under the map approved by the district court in 1982, not the 1981 City Council map. To determine the seriousness of the violation, therefore, the district court compared the violations left unremedied by the 1982 map to the compromise map approved in 1985. The district court compared not only the difference in minority population between the 1982 map and the 1985 map, as the parties opposing special elections requested,<sup>150</sup> but, as plaintiffs requested, the numbers of people moved as a result of the 1985 compromise. For example, the black population of the 15th ward increased by only 14.2% between the 1982 and 1985 maps. The district court found that considering only this change in minority population understated the impact of the new map. To increase black population by 14%, over 40% of the ward's population was either moved

145. *Id.* The United States joined plaintiffs' request as to only six of the seven wards, contending that the electoral changes in the 18th ward were not significant enough to justify special elections.

146. *Id.* The Supreme Court set forth the responsibilities of federal courts called upon to remedy violations of racial minorities' voting rights, noting that "[a] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as for like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

147. 489 F.2d 1098, 1103 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

148. *Ketchum*, 630 F. Supp. at 565.

149. *Id.*

150. *Id.* at 566-67. The 25 aldermen-intervenor-ors who joined the compromise map, as well as the parties who opposed the compromise, opposed special elections. Plaintiffs, the United States, the City Council (through the Corporation Counsel) and intervenor- League of Women Voters and Better Government Association supported special elections. *Id.* at 564.

into or out of the ward. Thus, the 15th ward created by the 1985 redistricting was substantially different than the 15th ward which voted in 1983 and 1984 under the court-approved 1982 map.<sup>151</sup> As a result, the Court found that the 420,000 voters of the seven redrawn wards had yet to have a fair opportunity to elect candidates of their own choice in municipal elections<sup>152</sup> and that special elections were necessary to complete the remedy of the City Council's illegal actions.<sup>153</sup>

### III. THE APPROPRIATE REMEDY TO ILLEGAL REDISTRICTING

At each level of the case, the proceedings concerned the appropriate remedy to the well-established violation of the Voting Rights Act. Much of the debate centered on whether a 65% super-majority or simple majority was necessary to create a ward with effective minority voting strength and to remedy the illegal 1981 redistricting. Under the specific facts of this case, the 65% corrective should not have been the focus of the debate over the proper remedy. While the super-majority corrective may be appropriate in some cases, the 65% corrective was not strictly necessary to remedy the narrow violation found by the district court. After all, the district court found that only city-wide retrogression was at issue. The district court's use of a simple majority to measure effective voting strength, however, did not cure the voting rights violation committed by the City Council. Such a "remedy" would permit future City Councils to dilute established minority voting strength in a ward to the barest of a majority. The court's trouble in selecting an appropriate remedy in this case was the result of the failure of the district court initially to define with precision the violation of voting rights.

In considering a remedy to Voting Rights Act violations, courts should, as the Senate noted in approving the 1982 amendments to the Voting Rights Act, exercise their "traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."<sup>154</sup> To do so, the court must first correctly identify the violation, which was not done by the district court in *Ketchum v. Byrne*. This section will examine the flaws in both the 65% proposal and the City Council's suggestion that

151. *Id.* at 567.

152. *Id.*

153. *Id.* at 568. One group of intervenors filed a notice of appeal but that appeal was eventually dismissed for want of prosecution.

154. S. REP. NO. 417, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 208 (footnote omitted).

50% majorities are sufficient to protect minority voting rights in all circumstances. It will then suggest a more appropriate method of analyzing violations of the Voting Rights Act in cases such as *Ketchum v. Byrne*.

### A. The 65% Super-Majority

Based on the evidence presented at trial and the instances in which a 65% guideline had been used in the past, the Seventh Circuit initially held that the district court's failure to find that a 65% super-majority was necessary to create an effective minority voting strength was an abuse of discretion. Upon further consideration, the court simply held that it was an abuse of discretion not to consider more seriously whether to employ an approach similar to the 65% super-majority. While in many circumstances the 65% super-majority may be a necessary and appropriate element of the remedy to a redistricting violation, given the violation that the district court found, the 65% super-majority approach focused on the wrong factors.

Without belaboring the obvious, before a court can "completely remed[y] the prior dilution of minority voting strength,"<sup>155</sup> it must first define the violation to be remedied. In *Ketchum*, the violation found by the district court was the unlawful city-wide retrogression in minority voting strength. While the Seventh Circuit commented extensively on other evidence of unlawful discrimination, such as packing, fracturing, and boundary manipulation,<sup>156</sup> its holding was that the City Council discriminated against black residents of the city of Chicago by not providing nineteen black majority wards and four Hispanic majority wards, as had been the case prior to redistricting.<sup>157</sup> The district court did not make factual findings that prior to the illegal redistricting, the voting strength of minority citizens in any of the city's wards was "effective." Moreover, the Seventh Circuit declined to upset the district court's conclusion that retrogression within a ward was not actionable.<sup>158</sup> Thus, attention to a 65% super-majority seemed misplaced: to remedy the violation found by the district court and affirmed by the Seventh Circuit, only majority wards, not 65% super-majorities, were needed.

Without holding that the violation was the elimination of an effective majority for the resident black or Hispanic population, or a factual

155. *Id.*

156. *Ketchum*, 740 F.2d at 1407-09.

157. *Id.* at 1417.

158. *Id.* at 1414. Nonetheless, as shown above, *see supra* text accompanying note 117, by directing attention to changes from pre-redistricting strength, the Seventh Circuit's reasoning supported the theory that retrogression within a ward was actionable.

finding that a 65% majority was essential to effective minority voting strength, the law did not require a 65% corrective. The Solicitor General was correct in advising the United States Supreme Court that the Court previously had affirmed decisions in which the lower courts had rejected the argument that "enhanced majorities" were necessary to remedy violations under Section 2 of the Voting Rights Act.<sup>159</sup> While the Supreme Court frequently has approved remedial plans in other areas that encompass procedures particularly designed to advantage minority groups,<sup>160</sup> the Court has not found such a procedure to be a mandatory element of a judicial remedy. The 65% super-majority, therefore, was not required as a matter of law to remedy the retrogression in the number of black wards.<sup>161</sup>

Had the district court, or the court of appeals, found that the violation was more than "retrogression . . . in the number of wards with a black majority population," a super-majority could have been an essential element of a remedy. To remedy the particular violation found by the district court, however, the 65% corrective was not compelled by either precedent or the peculiar facts of the case. While the district court certainly erred in its definition of liability, unless the Seventh Circuit was willing to expand that definition of liability, the requirement for a 65%

159. In *Jordan v. Winter*, 604 F. Supp. 807, 809, 814-15 (N.D. Miss. 1984) (three-judge panel), the district court found that a 58% black total population (52.8% black voting-age population) was sufficient to overcome past discrimination and provide an equal opportunity for minority candidates to participate in congressional elections, despite plaintiffs' request for a 64% black population to remedy low voter registration and turnout. *Id.* The Supreme Court summarily affirmed the three-judge district court decision. *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984). Likewise, in *Seamon v. Upham*, No. P-81-49-CA, slip op. at 11-12 (E.D. Tex. Jan. 30, 1984) (three-judge panel), the three-judge district court panel rejected the claim that a 65% minority population was essential to enable minority voters to elect a candidate to office. *Id.* The United States Supreme Court summarily affirmed. *Strake v. Seamon*, 469 U.S. 801 (1984). As summary affirmances, both cases have precedential effect.

160. In the employment context, this type of relief, described as "affirmative action," has frequently been approved where used to remedy past discrimination. *See, e.g., Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 628-29 (1987). In voting cases, the same analysis supports the use of affirmative relief where, as here, discrimination has been proven. In the proper case, therefore, the 65% standard is an appropriate way to "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

161. The cases on which plaintiffs relied in support of the 65% standard reveal that the standard can be an important part of a judicial remedy to voting rights discrimination. In *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977), the Supreme Court rejected the claim that consideration of race to obtain Justice Department approval was improper. The criteria used by the state to define effective minority voting strength—65%—was also approved. In addition to holding that the plan did not dilute white voting strength, *id.* at 165-66, the Court found the State's use of the 65% guideline was reasonable. The 65% standard was referred to approvingly as a "general guideline" to measure the minority population necessary to permit minority residents a meaningful opportunity to elect candidates of their choice in *Rybicki I*, 574 F. Supp. at 1113 n.87, and in *United States v. Mississippi*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

super-majority went beyond the appropriate remedy for the violation originally found by the district court.

### *B. Insufficiency of Simple Majority*

While the Seventh Circuit may have gone too far in endorsing the 65% corrective based on the liability holding of the district court, it is equally true that the district court, and the City Council on which it relied, did not go far enough to remedy the admittedly illegal 1981 redistricting. Two examples given by the Seventh Circuit in the amended opinion demonstrate the failure of the district court to remedy the deprivation of minority voting rights. In 1980, before the 1981 redistricting, the black population in the 15th ward exceeded 66%. The City Council, in violation of the Voting Rights Act, reduced the black population in the ward to only slightly over 41%.<sup>162</sup> The plan approved by the district court in 1982 increased the black population to 60%, which was greater than it was under the City Council map, but still significantly less than the black population prior to discrimination.<sup>163</sup> Likewise, in the 37th ward, black population exceeded 76% before the redistricting and was reduced to only 36.8% by the illegal City Council plan. The district court restored black population to 61% in the 37th ward. While restoring a ward with a "black majority population," this "remedy" did not return the ward to its pre-discrimination minority population strength.<sup>164</sup>

This argument did not persuade the district court, because the violation it found was only city-wide retrogression, rather than the manipulation of ward boundaries on a ward-by-ward basis. The Seventh Circuit, despite expressing sympathy for the theory of violation expressed by the plaintiffs, did not reverse the district court's conclusion that only city-wide retrogression constituted a violation.<sup>165</sup> Thus, while restoring minority voting strength at any level less than the prediscrimination level might not have satisfied the congressional command to "completely

162. *Ketchum*, 740 F.2d at 1406.

163. *Id.* at 1411. The district court's theory of liability would permit the City Council to transform every "safe" black majority ward into a ward with a slim black majority. Despite diluting minority voting strength, the district court's theory of liability would permit such manipulation.

164. *Id.* These two wards demonstrate the Seventh Circuit's direction to consider changes downward from initial voting strength rather than upward from the district court-approved plan.

The 15th and 37th wards also demonstrate the conflict within the Seventh Circuit's opinion. The Seventh Circuit, despite its sympathy with plaintiffs' contentions, did not expand the theory of liability beyond the district court's finding of city-wide retrogression. If this was the theory of liability, then returning wards 15 and 37 to majority black wards, albeit at diminished strength, was sufficient. The court-approved map remedied city-wide retrogression. The fact that the Court rejected this "remedy" suggests that despite its narrow holding, it believed the theory of liability and resulting remedy should be much more broadly defined.

165. *Id.* at 1406-10.



remed[y] the prior dilution of minority voting strength"<sup>166</sup> and might have left minority voting strength at less than effective levels, the inadequacy of the remedy was due to the district court's erroneous definition of the violation. Attention to minority voting strength and effective majorities may have been seen by the Court of Appeals as a way to correct the errors committed by the district court. However, the district court's remedial error was founded on its limited definition of the violation, which the Seventh Circuit left in place.

### C. *A Proper Approach to Liability and to Remedy*

The approach to remedy in this case lost touch with reality as soon as the district court chose to concentrate on city-wide retrogression as the sole basis of liability. Evidence presented at trial, and described in detail in the Seventh Circuit's opinions,<sup>167</sup> shows that the City Council's violation went far beyond the elimination of black population majorities in two wards.

The City Council engaged in gross manipulation of boundaries to protect white incumbents and to minimize minority voting strength. To reduce the population in over-populated wards to meet the one person, one vote standard, residents had to be moved from one ward to another. While redistricting is undoubtedly a complex process, and often sets in motion a ripple effect through other wards, the City Council manipulated ward boundaries to reduce or eliminate black majorities and preserve the wards for white incumbents. The 37th ward provides a striking example of this violation. Prior to redistricting, the population of the 37th ward exceeded the 60,101 targeted to comply with the one person, one vote standard by more than 17,000 residents. Ostensibly to remedy this situation, the City Council removed over 40,000 residents from the 37th ward, over 96% of them black, and added over 23,000 residents to the ward, only 1.4% of them black, thereby changing a substantial black majority to a white voting-age majority and protecting the white incumbent.<sup>168</sup> Similar results were achieved by extensive boundary manipulation in other black and Hispanic majority wards.<sup>169</sup>

The City Council also fractured viable black and Hispanic communities, forming sizeable, yet politically powerless, minorities within white majority wards. By placing substantial minority populations into adja-

166. *Ketchum*, 740 F.2d at 1412.

167. *See, e.g., id.* at 1406-10.

168. *Id.* at 1407.

169. *Id.* at 1407-08. As the court noted, this very practice was identified in *Rybicki I* as discriminatory. *Id.* (citing *Rybicki I*, 574 F. Supp. at 1109-12).

cent white wards, the City Council reduced the number of minority wards. Where the creation of a black ward was unavoidable, the City Council packed black residents in great numbers into the ward.<sup>170</sup> Thus, where the City Council created a majority black ward, the ward would be nearly unanimously black.<sup>171</sup> As shown above, the cumulative effect of this discrimination can be seen in those wards that crossed an imaginary line encircling all contiguous majority black and/or Hispanic census tracts. The effect of boundary manipulation, packing, and fracturing was to dilute minority voting strength. Thus, for whatever the reason, be it to protect white incumbents, to discriminate against minority residents, or for any other reason, the effect of the City Council's actions was to minimize minority voting strength.<sup>172</sup>

Had these violations been the focus of the district court's finding of liability, as they should have been, the selection of an appropriate remedy would have been simpler: the appropriate remedy would have been to adopt an alternative plan in which lines were drawn without regard for race, or simply to return the configuration of city wards, as nearly as possible, to that which existed prior to discrimination. Had it done so, the district court would have acted as a common law court, making the injured parties whole. The district court could have considered whatever method it felt appropriate, including the 65% corrective, to restore effective minority voting strength. The district court would have fulfilled the congressional directive to provide equal opportunity for all citizens to participate in electoral politics and also would have eliminated the prior dilution of minority voting strength. The selection of a remedy would not have protected the voting power of any racial group, authorized judicial allocation of political power on racial lines, assured proportional representation, or protected the constituency of an incumbent. Rather than being sidetracked by a distorted definition of liability, the remedy would return to the central focus of the Voting Rights Act.<sup>173</sup>

170. The Chicago Hispanic community is more geographically distributed and is less susceptible to packing.

171. In a city with 60,101-person wards and segregated housing patterns, such as Chicago, a 600,000 population group could be packed into 10 wards or distributed through 19 majority wards. Faced with these alternatives, the City Council packed the black population and distributed the white population. Thus, the 39% black population controlled only 17 majority black wards while the 42% white population controlled 24 majority white wards.

172. Under the amended Voting Rights Act, it is the effect, rather than intent, which courts must scrutinize. See 42 U.S.C. § 1973b(b) (1982). Cf. *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (discriminatory intent, not effect, must be proven). The effect of boundary manipulation, fracturing and packing may have been to protect white incumbents; it also was to dilute minority voting strength.

173. The settlement map, particularly as augmented by special elections, actually served these purposes well. Far more than simply eliminating city-wide retrogression, the settlement map re-

## CONCLUSION

The bitterness and divisiveness of the 1981 ward redistricting process and the ensuing litigation linger as tensions between racial and ethnic groups reverberate throughout Chicago. At the same time, 1991 is fast approaching. Political leaders in the city and State owe it to all citizens not to repeat the grievous injustices of the 1981 redistricting process. With the guidance of history and the Seventh Circuit's opinion, it is hoped that the 1991 redistricting process will be open, public, and fair to all racial and ethnic groups.

stored pre-redistricting minority population strength. Moreover, the special elections ordered by the district court reversed the worst consequences of the 1981 redistricting. Taking seriously his responsibility to remedy the deprivation of voting rights and "[a]ware of the singular importance of the right to vote in a republic and the deleterious consequences to a democracy that arise whenever racial discrimination is permitted to dilute and distort the voting strengths of any group," Judge Norgle corrected many of the errors of prior judicial interpretation with his far-reaching remedy. *Ketchum*, 630 F. Supp. at 568.